

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-7278

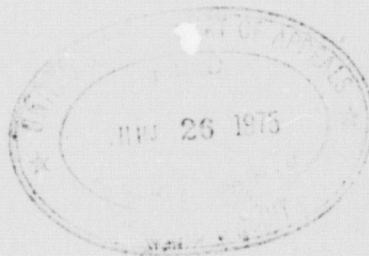
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT----- X
REBECCA REYHER and RUTH GANNETT,

Appellants,

v.

CHILDREN'S TELEVISION WORKSHOP and
TUESDAY PUBLICATIONS, INC.,Appellees.
----- XOn Appeal from the United States
District Court for the Southern
District of New York

BRIEF FOR APPELLANTS

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----- X

BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

Plaintiffs Rebecca Reyher and Ruth Gannett appeal the order of Judge John Cannella who denied their claim of copyright infringement and ruled after a trial in favor of defendants Children's Television Workshop and Tuesday Publications.

The infringement claim against defendants was based on plaintiffs' 1945 copyright of a book entitled "My Mother is the Most Beautiful Woman in the World". Plaintiffs' book, a children's classic and winner of a children's fiction award¹

1. Caldecott Prize (T. 100, A. 51). References to the trial record will be made by T. followed by page number; references to the Appendix by A. followed by page numbers.

has gone through twelve printings since 1945.²

In November 1970, Children's Television Workshop, Inc. produced a television dramatization of plaintiffs' story similarly titled "The Most Beautiful Woman in the World" which appeared on national television on the well-publicized children's program "Sesame Street". Later that defendant published a short story with the same title in "Sesame Street Magazine" and defendant Tuesday Publications, Inc. printed an illustrated story in "Tuesday at Home" magazine also bearing the same title. Defendants copyrighted each of their versions of the work.

Plaintiffs assert that the dramatic television production and the illustrated stories in "Sesame Street Magazine" and "Tuesday at Home" are unauthorized copies of their copyrighted book and infringe upon their duly issued copyright issued pursuant to Title 17 U.S.C. §§ 101, 112, and 116.

At the trial evidence was adduced of the plaintiffs' copyrighted story and the derivative authorized motion picture and of the television and story versions published and distributed by the defendants. Although plaintiff testified that she had heard a version of the story told her many years ago in Russia and in the Russian language by her own mother, no evidence of any kind was introduced by the defendants of any source other

2. In 1968 plaintiffs authorized a copyrighted motion picture based upon the story of the copyrighted book.

than plaintiffs' story and in fact it was conceded that plaintiffs' story was the only such story in existence in the English language (T. 273, A. 67).

The court below, in dismissing plaintiffs' complaint, acknowledged that "there is a substantial similarity between plaintiffs' copyrighted book and defendants' allegedly infringing works", (A. 7), that "no individual comparing the works at bar could help but conclude that they are substantially similar" (A. 7), that "both stories present an identical sequence of events" (A. 7), that "defendants' use of a story line . . . is substantially similar to that appearing in plaintiffs' copyrighted book" (A. 11), and that "[t]he most that could be said is that [defendants] have read the plaintiffs' work and have retold the story in their own words." (A. 10).

The court ruled, however, that there was no infringement of copyright on the part of the defendants. That conclusion was based on the court's finding that

" . . . plaintiffs' book is a 'derivative work,' that is, it has been 'substantially copied from a prior work' in the public domain. (1M. Nimmer on Copyright §39 at 166). The accepted rule as restated in the proposed copyright law is that '[t]he copyright in a derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work" (A. 9)

The court held that plaintiffs' book was derived from a story in the public domain and that defendants "have done nothing more than make their own variation" (A. 11) of the

public-domain story. The court made this finding in the absence of any evidence that such a story was in the "public domain" and in the face of extensive evidence, by way of plaintiff Rebecca Reyher's testimony, to the effect that she had created the story out of her memories of the story she had heard from her mother in Russian and had adapted those memories to tell the story to an American children's audience.

After the complaint was dismissed, plaintiffs requested that the District Court amend its findings and judgment. This request was denied (A. 4).

QUESTIONS PRESENTED

(1) Did the court below err in dismissing a complaint of copyright infringement where the similarity of defendants' work to plaintiffs' work created a presumption of copying and where defendants offered no evidence that they created their work from a source other than from plaintiffs'?

(2) Did the court below err in the characterizing as "derivative" a children's book written in English which consisted of an interpretation and translation of a Russian language oral story which the author of the book heard as a young child from her mother and as to which there was no evidence of its existence in the public domain?

(3) Did not the patent and conceded similarity of the defendant's illustration to plaintiffs' illustration demonstrate access and infringement and underline the error of the

ruling of the court below?

FACTS BELOW

In 1945 plaintiffs duly registered the book "The Most Beautiful Woman in the World" in the copyright office (No. A187751) (A. 71). The copyright was duly renewed at the expiration of twenty-eight years (T. 101, A. 52). The book was written by plaintiff Rebecca Reyher and illustrated by plaintiff Ruth Gannett. Judge Cannella found that the book

"tells a simple but pointed story. In essence, it relates the tale of a small Russian peasant girl who is lost in the Ukraine. The little girl, having been separated from her mother, makes her way to a village where she tells the inhabitants only that 'my mother is the most beautiful woman in the world'. Upon hearing this the villagers proceed to search the surrounding area and to bring all of the local beauties to see the little girl in the hope that one of them will turn out to be her mother. Eventually, the little girl's mother does appear. She is, to the villagers' surprise, a rather homely looking woman. The little girl, however, is not surprised and tells the villagers, 'this is my mother, the most beautiful woman in the world.' The moral, as the village leader points out, is that 'we do not love people because they are beautiful, but they seem beautiful to us because we love them.'" (A. 6 - A. 7)

Plaintiff Reyher testified that she heard the story as a child from her mother (T. 69, A. 36) who "frequently did change or make up stories" (T. 148, A. 59). The story was communicated from mother to child orally in the Russian language (T. 71, A. 38). Mrs. Reyher testified that she did not hear the story from anyone other than her mother (T. 148, A. 59).

Mrs. Reyher did not know of her own knowledge whether or not there was a Russian folktale similar to the story her mother told her (T. 147, A. 58). No other evidence was presented indicating that there was a Russian-language story prior to Mrs. Reyher's writing of the copyrighted book.

Tibor Gergely, who illustrated defendants' magazine stories and who, plaintiffs assert, infringed upon the copyrighted illustrations of their book, testified that he had read a German version of the story prior to plaintiffs' publication of their copyrighted book. Gergely's testimony, however, was contradictory and uncertain.

"Q. You say that you heard that story sometime in the past?

A. I didn't hear it. I read it.

Q. Oh, you read it?

A. Yes.

Q. I see. Where did you read it?

A. Some book.

Q. Do you know the name of the book?

A. No, I don't.

Q. In what language was it published?

A. Most probably German.

Q. And where did you see this book?

A. Most probably in Vienna." (T. 240, A. 64)

Gergely contradicted his own testimony that he didn't know the name of the book when later he testified that he read

the story "in [a] particular series of books which was called 'Märchen der Weltliteratur'." (T. 244, A. 66).

In testifying that the story he read was in the German language, Gergely contradicted a previous statement he made in a deposition that he didn't know what language the story he had read was written in (T. 243, A. 65). No copy of the German language story or any other version in any language was introduced in evidence.

Defendants conceded that plaintiffs' work was the only version of the story in the English language (T. 273, A. 68) and they offered no evidence of any other version in any other language.

Plaintiff Reyher testified at length concerning the process of writing in English prose a book suggested by a story which she had heard many years earlier as a child, a task which was both creative and taxing. She testified that her book was a result of a process which was more creative than that which mere translation demands.

"It not only required a translation, it required two volumes of a Russian dictionary to check certain words and impressions that I had because this was an impression rather than a literal translation. Anything that I used that she [my mother] had told me might have been a translation, but it also was primarily a mood and mine was an interpretation." (T. 71, 72; A. 38, 39)

Mrs. Reyher testified that she departed from a literal translation to make her prose more "rhythmic" (T. 73, A. 40), "sound American" (T. 92, A. 43), "vivid and dramatic" (T. 95,

A. 46), and to make her story appealing to American children (T. 97, A. 48). She testified that she had forgotten the specific words her mother had used in telling the story and that she created her book using only a "skeleton" of (T. 120) her mother's story.

In November of 1970, Children's Television Workshop produced a puppet play entitled "The Most Beautiful Woman in the World" (film: "Exh. 4"; Transcript: "Exh. 5"; video tape: "Exh. 12"; audio transcript of video tapes: "Exh. 13") which Judge Cannella found to be substantially similar to plaintiffs' copyrighted book. Shortly thereafter defendant Children's Television Workshop produced a filmstrip ("Exh. 6"), a phonograph record (record: "Exh. 7"; transcript: "Exh. 8") and an illustrated magazine article ("Exh. 9") which Judge Cannella found to be substantially similar to plaintiffs' copyrighted book. Defendant Tuesday Publications, Incorporated published an issue of "Tuesday at Home" magazine which contained an illustrated article ("Exh. 11") which was substantially similar to plaintiffs' book.

The script for the television program was written by Jon Stone, a defense witness in the trial. The other allegedly infringing publications by defendants were written after Stone's script was dramatized and televised. Defense counsel conceded that "If Stone did infringe, it follows that the others did infringe." (T. 5, A. 32)

Stone wrote his script sometime in the autumn of 1970. He testified that he first heard the story which he dramatized "around 1950" (T. 158, A. 62), or about five years after plaintiffs' book was published. The story he heard was in English. Stone testified that he heard the story from either his mother or from his sister's baby-sitter (T. 158, A. 62), neither of whom is alleged to have understood the Russian or German language. Stone testified that he did not know the source of the story told by the storyteller (T. 212).

Judge Cannella found Stone's script to be substantially similar to plaintiffs' book, to present "an identical sequence of events" as plaintiffs' book (A. 7) and to contain at least one sentence ("Once upon a time, long, long ago") which is a verbatim replica of plaintiffs' words. The record discloses phrases and developments in defendants' works which occur in plaintiffs' book but which Mrs. Reyher testified she changed from the version she remembered hearing from her mother: the use of the word "mother" rather than "mama" in the title; the insertion of the word "woman" in the title (T. 73, 74, A. 40, 41); the use of the dramatic device of worried villagers shaking their heads (T. 95, A. 46); the presentation of a crowd scene (T. 98, A. 49); the location of villagers out in the field (T. 127, A. 54); the use of the verbal phrase "bring back" to describe the command given to village boys (T. 92, A. 43). Furthermore, in defendants' magazine version

(Exh. 9, Exh. 11) there is an illustration (A. 70) which depicts the reunion of mother and child which plaintiffs' expert witness found to be so similar to a picture in plaintiffs' copyrighted book that he testified that there was a "very rare probability" (T. 50) that the similarities would exist if there had been independent creation on the part of defendants' illustrator.

POINT ONE

IT WAS REVERSIBLE ERROR FOR THE COURT BELOW TO DISREGARD THE PRESUMPTION OF VALIDITY ATTACHED TO PLAINTIFFS' COPYRIGHT AND TO RULE AGAINST PLAINTIFFS IN THE FACE OF THE COURT'S FINDING OF SUBSTANTIAL SIMILARITY IN THE INFRINGING WORKS AND THE ABSENCE OF ANY OTHER RECOGNIZED SOURCE AS THE BASIS FOR DEFENDANTS' WORKS.

Title 17 U.S.C. § 209 establishes a copyright certificate as "prima facie evidence of the facts stated therein". The author's registration certificate presumptively connotes originality. M. Nimmer on Copyrights ¶ 139.1 p. 601. Upon introduction in evidence of the certificate, the plaintiffs "established . . . the validity prima facie of [their] copyright and cast upon the defendant the burden of proving invalidity or tendering disproof of the facts stated in the certificate." Addison Wesley Publishing Co. v. Brown, 223 F. Supp. 219, 224 (E.D.N.Y. 1963); Geisel v. Paynter Products Inc., 295 F. Supp. 331, 338 (S.D.N.Y. 1968); Gerlach-Barklow Co. v. Morris & Bendien, 23 F.2d 159, 161 (2 Cir. 1927); Nimmer ¶ 139.1 at p.602.

The defendants offered no evidence challenging the validity of the copyright nor did they challenge Mrs. Reyher's contention that her copyrighted book was an original interpretation and translation of a story based on one she heard as a child from her mother (T. 71, 72, A. 38, A. 39). They thereby conceded the originality of the copyrighted work. "[A]daptions . . . translations or other versions of works in the public domain . . . shall be regarded as new works subject to copyright under the provisions of this title . . ." (17 U.S.C. §7). That there may have been a public domain source of the work is irrelevant to the issue of validity of copyright where there has been an adaptation or translation of a prior work. When a copyrighted work is original

"the public demesne is important only on the issue of infringement; that is so far as it may break the inference to be drawn between the work and putative piracy. If the defendant has had access to other material which would have served him as well, his disclaimer becomes more plausible" Sheldon v. Metro-Goldwyn Pictures Corporation, 81 F.2d 49, 54 (2 Cir. 1936).

In Sheldon Judge Learned Hand, writing for this Court, reversed a judgment for defendants and ruled in favor of the plaintiff finding among other similarities in the works "exactly the same sequence of events" (p. 55). Nor did he find it necessary to find a deliberate plagiarism since "unconscious plagiarism is actionable quite as much as deliberate" (p. 54).

Moreover, an inference of copying arises when a later

work is found to be substantially similar to a copyrighted work and when there is evidence that the author of the later work had access to the earlier, copyrighted work. Nimmer ¶ 139.4 p. 605. Judge Cannella found that defendants' works were substantially similar to plaintiffs' copyrighted book and implicitly found access: "The most that could be said is that they [the defendants] have read the plaintiffs' work and have retold the story in their own words." (A. 10) Access may be "inferred or found circumstantially", Wilkie v. Santly Bros., 91 F.2d 978, 979 (2 Cir. 1937); Arnstein v. Porter, 154 F.2d 464, 469 (2 Cir. 1946). Access can be implied by mere possibility of access. De Acosta v. Brown, 146 F.2d 408, 410 (2 Cir. 1944); and in at least one decision in this Circuit access has been implied upon general publication and distribution of the prior copyrighted work. Judge John Woolsey wrote in Detective Comics Inc. v. Bruns, 28 F.Supp. 399 (S.D.N.Y. 1939) affd. 111 F.2d 432 (2 Cir. 1940) that "access . . . certainly has been established because the plaintiff's magazine was on the newsstands for circa a year before the defendant's magazine was published." (111 F.2d 432)

It was uncontroverted that at least 120,000 copies of plaintiffs' book had been distributed (T. 120). The book had attracted widespread fame when it was awarded literary prizes (T. 100, 104, A. 51, 53). It is further significant that an author of defendant's work, Jon Stone, first heard the story

on which he based his television script a few years after plaintiffs' book was published. Moreover, prior to the alleged infringing version, Stone's employer, C.B.S., had produced a phonograph record of plaintiffs' book (T. 218, A. 61).

Once there has been a showing of substantial similarity between defendants' and plaintiffs' works and a showing of access by defendant to plaintiffs' copyrighted work, defendant has the burden of negating the probability of copying by producing evidence of independent creation. Nimmer § 139.4 p. 606; Home Art v. Glenside Textile Corporation, et al., 81 F. Supp. 551, 553 (S.D.N.Y. 1948); Stephens v. Howells Sales Co., 16 F.2d 805, 808 (S.D.N.Y. 1926). The general rule was explained in Hollywood Jewelry Mfg. Co. v. Dushkin, 136 F. Supp. 738, 739 (S.D.N.Y. 1955), a case of infringement of copyrighted jewelry:

"The burden of proving copying is on the plaintiff, but when he has made a strong prima facie case by pointing out a convincing number of similarities, the burden of going forward with evidence explaining such similarities is on defendant."

The defendant is required to "counter with strong convincing and persuasive evidence . . . to refute the inference of copying." Overman v. Loesser, 205 F.2d 521, 523 (9 Cir. 1953). Defendants attempted to meet this requirement by asserting without more, that the story on which its authorship was based was in the public domain.

In fact, there was no evidence to support a finding

that the defendants used as an independent source for their story any version of it in the public domain. In Wihtol v. Wells, 231 F.2d 550, 553, 554 (7 Cir. 1956), the court said:

"A copyright protects an original work and is not dependent on novelty. Baker v. Selden, 101 U.S. 99, 102-103, 25 L.Ed. 841. In Alfred Bell & Co. Ltd. v. Catalda Fine Arts, 2 Cir., 191 F 2d 99, the Court said at page 102: 'It is clear then that nothing in the Constitution commands that copyrighted matter be strikingly unique or novel. Accordingly we were not ignoring the Constitution when we stated that a 'copy of something in the public domain' will support a copyright if it is a 'distinguishable variation' . . . In Stein v. Mazer 4 Cir. 204 F 2d 472, 474, the Court said 'Since a copyright is intended to protect authorship, the essence of copyright protection is the protection of originality, rather than novelty or invention.'"

"The certificate of registration introduced by plaintiff is prima facie evidence under the Copyright Act of the validity of plaintiff's copyright. The burden of proof is on the defendant to overcome this prima facie presumption of validity. National Institute, Inc. v. Nutt, D.C. 28 F 2d 132, 133. To do this, defendant points to a 'Foreword' carried on some early editions of plaintiff's work stating: 'The Melodic element of this Etude is from a Russian folksong'.

"The only evidence of any antecedent of any part of the copyrighted work is plaintiff's own statement that during his boyhood days in Riga he heard a tune similar to the melody score of the copyrighted work, played on a hurdy-gurdy.³ But it was original work on the plaintiff's part when, some thirty years later, he devised a calculated melody score thus putting it in shape for all to read."

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3. Plaintiff Reyher's testimony that she heard a similar story years ago told to her by her mother is certainly similar to the factual situation in Wihtol.

And again in Mills Music v. Cromwell Music, 126 F.S. 54, 74 (S.D.N.Y. 1954) the court said:

"Saying that the Miron composition was in the nature of a folk song, does not prove that it was known or sung prior to Miron's work."

The District Court misapplied the law when it held that the fact that plaintiff Reyher's "story line as it appears in her copyrighted book is substantially taken from, if not identical with the story told her by her mother" (A. 8) somehow vitiated her copyright protection. Plaintiff Reyher is in the same or better position than the plaintiffs in Wihtol and Italian Book Co. v. Rossi, 27 F.2d 1014 (S.D.N.Y. 1928) (see Point II p.19 infra), in having heard a story in her youth -- otherwise unknown and not proven to be in the public domain (and even if so) -- adapted and publicized first by her in the English language.

As previously stated, the author Jon Stone said his only source was a tale told him by his mother or a "baby sitter" who presumptively read plaintiffs' work. Tybor Gergely, the defendant's illustrator, asserted that he once saw a German language copy of the story. There was never any contention that Mr. Stone read any such story in German. At one point Gergely testified that he did not know the name of the book in which he read the story (T. 240, A. 64). Later he testified that he did know the name of the series in which the story appeared. Nonetheless, defendants did not produce the book at trial.

According to II Wigmore 3rd Ed. 285 p. 162,

"The failure to bring before the tribunal some circumstance, document or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate as the most material inference, that the party fears to do so, and this fear is some evidence that the circumstances or document or witness if brought forward would have exposed facts unfavorable to the party. The non-production of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause."

The defense also tried to establish that there existed in the public domain a Russian-language story similar to Mrs. Reyher's.⁴ Judge Cannella observed that "no direct evidence was adduced 'to support this allegation'" (A. 8). Mrs. Reyher did testify in several instances that in her opinion the story she heard from her mother was a Russian folktale. However, Mrs. Reyher said that she had heard the story only from her mother and from no one else; she is not an expert on folktales (T. 148, A. 59). Mrs. Reyher testified that she had no knowledge that the story was a Russian folktale (T. 147, A. 58). She also stated that her characterization of the story as a folktale was based only on assumption (T. 147, A. 58). Thus, on the record before this Court, there was no evidence to support a finding of fact that the story existed as a folktale, or if so,

4. The title page of the plaintiffs' work states "My Mother is the Most Beautiful Woman in the World, a Russian Folktale Retold by Becky Reyher".

exactly what was the underlying story or sequence of events (See X Wigmore (3rd Ed.) ¶ 2494, p. 296-299; McCormick on Evidence ¶ 4).

Furthermore, a precedent has been established in this Circuit demonstrating the manner in which a defendant should establish the existence of a public-domain element when the element does not exist in tangible form. In Life Music v. Wonderland Music Company, 241 F. Supp. 653 (1965 S.D.N.Y.), in an action for a preliminary injunction, the defendant produced affidavits from disinterested witnesses who swore that the intangible public-domain element (in that case a multi-syllabic meaningless word) existed before plaintiffs published their work. Defendants, here, have not produced any such evidence.

In other cases in this Circuit in which the existence of a public domain source was asserted as part of a defense, defendants came forward with tangible evidence of the existence of the public domain source. In London v. Biograph, 231 Fed. 696 (2 Cir. 1916) defendants showed that the plot of their allegedly infringing story came from a specific story by Chaucer and another specific story of Kipling; in Millworth Converting Corporation v. Slifka, 276 F.2d 443 (2 Cir. 1960) defendants brought forward an uncopyrighted cloth design which existed in the public domain. Similarly in Costello v. Loew's Corp., 159 F.Supp. 782 (U.S.D.C. 1958), cited by the court below (A. 10), the court had before it for comparison the two

works (in the public domain) on which plaintiff's and defendant's work was based. Defendants here have made no such showing.

Furthermore, defendants have not rebutted the presumption of copying which was created by the finding of the court below of similarity between their works and plaintiffs' book. To do so defendants must prove that they read or knew of the original public domain story and that the author of the infringing work actually made use of that public domain source. In a case analogous to this one, Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7 Cir. 1950) defendant was found to have copied plaintiffs' biography of Hans Christian Anderson.

Defendant asserted as a defense the fact that the works of Anderson which appeared in both plaintiff's biography and defendant's novel were part of the public domain. As in this case, the words in the public domain (if they were in the public domain) were in a language which the defendant's author did not understand. The court in Toksvig, in finding infringement, noted that

"[t]he question is not whether [defendant] could have obtained the same information by going to the same sources, but rather did she go to the same sources and do her own independent research? In other words the test is whether the one charged with infringement has made an independent production or made a substantial and unfair use of the complainant work." (at 667)

Several decisions within this Circuit are in accord with the Toksvig v. Bruce decision. See Banks v. McDivitt, 2 Fed. Cases 759, Case #961 (S.D.N.Y. 1875); Hartfield v.

Peterson, 71 F.2d 998 (2 Cir. 1937); Italian Book Co. v. Rossi, 27 F.2d 1014 (S.D.N.Y.). See also Davis v. E.I. duPont, 240 F. Supp. 612, 620 (S.D.N.Y. 1965); Alva Studios v. Winnegar, 187 F. Supp. 265, 268 (S.D.N.Y. 1959); 20 American Jurisprudence, Proof of Facts §768; Life Music Inc. v. Wonderland Music Company, 241 F. Supp. 653, 656 (S.D.N.Y. 1965).

Infringing author Stone has not shown that he made use of any public domain sources which might have existed in either the German or Russian languages, and accordingly the defendants failed in meeting their burden of proof.

POINT TWO

THE COURT BELOW ERRED IN APPLYING A RESTRICTIVE STANDARD CONCERNING "DERIVATIVE WORK" IN DENYING A FINDING OF INFRINGEMENT WHERE THERE WAS NO EVIDENCE OF AN UNDERLYING ENTITY OR ANY OTHER SOURCE RELIED ON BY DEFENDANTS FOR THEIR CLEARLY INFRINGING WORKS.

The court below commenced its mistaken reasoning by asserting as a premise:

"It is clear from plaintiff's testimony that the story line as it appears in her copyrighted book is substantially taken from, if not identical with, the story told to her by her mother."

This is a finding at variance with the evidence.

Plaintiff Reyher did not depend exclusively -- and no one can say how substantially -- upon the sequence of events in the story she remembered her mother had told her many years before; she described in detail the original and creative steps she took in

the writing of her story (this brief pp. 7, 8) which went beyond recollection and translation and constituted, indeed, an original adaptation of a remembrance, the independent existence of which was never shown.

In this connection, the court below further erred in assuming that somehow a translation of a work is not protected in its entirety by the copyright law, i.e.,

" . . . plaintiff attempted to recall the story as told to her by her mother in Russian, and then to translate that recollection into English . . . It is thus clear to this Court that plaintiff's book is a 'derivative' work. That is, it has been 'substantially copied from a prior work in the public domain.'" (A. 8, 9)

Assuming arguendo that there was indeed evidence of an independent work in the public domain (which there was not) an English language translation is a "new work" subject to United States copyright. Olympia Press v. Lancer Books Inc., 267 F. Supp. 920, 922 (S.D.N.Y. 1967); cf. Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 104 (2 Cir. 1951).

Although it may be the law, Judge Cannella's assertion that

"[t]he accepted rule as restated in the proposed copyright law is that '[t]he copyright in a derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work. . .'" (A. 9),

is inapplicable to the record below because there is no evidence in the record differentiating pre-existing material from the

copyrighted work as a whole. In this connection the court below has misconstrued the copyright law.

Moreover, in a broad sense, almost all works are derivative in that in some degree they are derived from prior works. Said Justice Story in Emerson v. Davies, 8 Fed. Cas. 615, 619 (C.C.D. Mass. 1845),

"In truth, in literature, in science and in art, there are and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows and must necessarily borrow, and use much which was well known and used before. . . . In truth every author of a book has a copyright in the plan, arrangement and combination of his materials, and in his mode of illustrating his subject if it be new and original in its substance."

As long as 100 years ago courts in this Circuit have extended full copyright privileges to an author presenting in an original form what Judge Cannella calls "pre-existing material". In Banks v. McDivitt, 2 Fed. Cases 759, Case #961 (S.D.N.Y. 1875) the court held that a person may obtain a valid copyright in a book which presents rules of the New York State court -- information admittedly in the public domain.

The 1875 district court held that defendant infringed on plaintiffs' copyright when he copied the citations from plaintiffs' work. Even though the citations were pre-existing materials, defendant

"cannot use the labors of a previous compiler animo furandi and save his own time by copying the results of the previous compiler's study although the same results could have been

attained by independent labor. The compiler cannot adopt as his own the products of another's toil." 2 Fed. Cases 759, 760. Also see International Film S. Co. v. Affiliated Distributors, 283 Fed. 229, 234 (S.D.N.Y. 1922).

In Hartfield v. Peterson, 71 F.2d 998 (2 Cir. 1937) this Court held that a book which consisted of a listing of a code which existed in the public domain was a valid copyright whose force was not diminished because it was based on pre-existing materials. Judge Augustus Hand wrote:

"As we have already said, it does not make the slightest difference where the plaintiff obtained his material if defendant copied it. If it were demonstrated that any portions which Peterson copied were taken by Hartfield from prior sources available to both parties the former would still be an infringer."
71 F.2d 990, 1000.

Similarly, it does not make the slightest difference that Mrs. Reyher obtained the outline of her story from a story told her by her mother.

In Italian Book Co. v. Rossi, 27 F.2d 1014 (S.D.N.Y. 1928) a case very much on all fours with the case at bar, the District Court held that a song based on an old folk song was valid and that copying of the copyrighted song was an infringement.

"How much of Citorello's composition was subconscious repetition of this old song as he had heard it sung and how much of it was original with him no one can say. No doubt he had heard some variation of the old song and was trying to remember it, but the product differed in words and music from any version of it that had been proved, although the theme

was the same and the music quite similar. To the extent of such difference he was the author of the new arrangement of the words and music of an old song. That these differences were of some importance may be inferred from the plaintiff's commercial success in selling it and the defendant's desire to appropriate. There must have been something which Citorello added which brought the old song into popularity with his own people in this country and sufficient I think to support his claim of copyright. Of course the defendants could make their own improvisation of the old song or could copy it without change. They were free to copy the original but not to copy Citorello's variation. I am satisfied that they did not go back to the original but simply appropriated the Citorello song, making colorable changes in a clumsy effort to conceal their infringement." 27 F.2d 1014.

POINT THREE

ALTHOUGH IT FOUND SIMILARITY THE COURT BELOW DISREGARDED THE OBVIOUS IMITATION BY DEFENDANTS OF PLAINTIFFS' ILLUSTRATION, GIVING UNDUE WEIGHT TO INSIGNIFICANT DIFFERENCES WHICH UNDERLINED AND ESTABLISHED THE OVERALL INFRINGEMENT.

Unrebutted expert testimony in a comparison of the defendant's illustration with plaintiffs' illustration (A. 70) demonstrated an uncanny similarity in the lines and angles of the two different illustrations (T. 24-28). A professor of art called as an expert witness made the following comparison of the drawings:

"The attitude of the two characters in each illustration are the same. The mother comes from the rear right on both illustrations, the child comes from the lower left in each illustration. The gestures of the child, the

gestures of the arms, the positioning of the fingers, the tilt of the heads, the raised foot of the child in each illustration are exactly the same.

The attitude of the mother, the gesture of her body, the gesture of her arms outstretched are the same. Although the identities are a little different, the attitudes are the same." (T. 32, 33, A. 33, 34)

The inference which is inescapable from the testimony is that the defendants copied plaintiffs' illustration and made deliberate changes, i.e., a boy instead of a girl, an African mother instead of a Russian mother. The copying, however, becomes evident from the expert's analysis of angles and attitude and his conclusion on the issue of innocent similarity, that in thirty years of experience he had "never seen a coincidence like this." (T. 55, A. 35)

Against the above, the dramatic error of the court below is underlined by its ruling on the two illustrations -- the one, the plaintiffs' showing a mother with outstretched arms and a child running toward her (A. 70) -- the other the defendants' depicting a similar scene. Said the court below:

"Although the two illustrations here at issue do evince more than a passing similarity (in both the reunited mother and child are depicted running toward each other with arms similarly outstretched, in both the child's feet are positioned with the left foot raised in a similar fashion; finally, in both the posture of the mother and the relative positions of the mother and child are similar) it is this Court's finding that the differences between the two (the characters in the more impressionistic Gergely

illustration are black Africans dressed in their native garb, while in the Gannett drawing they are Caucasians in Russian peasant outfits; additionally, the Gergely child is a boy while Gannett's is a girl, and the Gergely mother has a package on her back and a stick at her feet while the Gannett mother is shown without accoutrements) are so substantial that the 'average layman would indeed detect numerous differences . . . which tend to eliminate any similarity of protected expression.'"

In the passage quoted above, the court ignored the expert's finding of improbability in the coincidence and it failed to reckon with the concept that infringement does not always consist in literal copying.

"Copying is not confined to a literary repetition but includes various modes in which the matter of any publication may be adopted, imitated or transferred with more or less colorable alteration." Nutt v. National Institute, 31 F.2d 236, 238 (2 Cir. 1929) cited in Addison Wesley Publishing Co. v. Brown, 223 F. Supp. 219, 227 (E.D.N.Y. 1963).

Moreover,

"The disguise of the source from which the material was derived does not defeat its protection of the copyright, nor does taking a part of the work constitute an evasion of the copyright." King Features Syndicate v. Fleischer, 299 F. 533, 535 (2 Cir. 1924) cited in Addison Wesley Publishing Co. v. Brown, 223 F. Supp. 219, 227 (E.D.N.Y. 1963).

CONCLUSION

This Court should reverse the decision of the court below.

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Respectfully submitted,

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